No. 10,775

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

//

JESSIE F. KING and GEORGE C. KING,
Appellants,

vs.

J. H. YANCEY, doing business under the firm and/or fictitious name of Yancey Insulation Co.,
Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

BRIEF FOR APPELLEE

E. F. LUNSFORD and
BERT GOLDWATER,
206 N. Virginia St., Reno, Nevada,
Attorneys for Appellee.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

PAGES

Texts

No. 10,775

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

JESSIE F. KING and GEORGE C. KING,
Appellants,

vs.

J. H. YANCEY, doing business under the firm and/or fictitious name of Yancey Insulation Co.,
Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The complaint in this action (Tr. pp. 2-12) contains much evidentiary matter and numerous conclusions of law. The statement of the case in the brief for appellants is a reiteration of the entire complaint. Appellee believes that the following, being a short statement of the ultimate facts as alleged in the complaint, is a better statement of the case for the application of the legal principles involved:

Appellants are husband and wife and the husband, at the time of the injury complained of, was employed as an outside salesman for the appellee. On Sunday, July 19, 1942, the husband drove with his wife to appellee's place of business for the purpose of obtaining samples of materials, which he contemplated using to consummate a sale in another city. The husband asked his wife if she desired to use the toilet at appellee's place of business and she replied that she did not at that time. Shortly thereafter the wife left the automobile, entered appellee's premises, and requested to use the toilet. (Tr. pp. 3-5). The husband directed his wife to the rear of the storeroom, advising her that the door to the toilet was partly open. The wife proceeded to the rear of the storeroom and, instead of opening the toilet door, which faced east and opened inwardly toward the west, she took the knob of the door to a stairway, which opened outwardly to the south. The wife stepped through the door and fell down a stairway, incurring the injuries complained of. (Tr. pp. 6-8).

The appellants contend that the wife, at the time of her injury, was in the status of an invitee, as she was to accompany her husband in his automobile on the trip and to keep him awake while driving. (Tr. p. 4). On the other hand, appellants claim that, even though the complaint does not show the wife to be an invitee, still that there is sufficient allegations to constitute wanton and wilful conduct, which would make appellee liable, even though the wife were a licensee or a trespasser.

It is Appellee's position that the wife, not being a customer or employee and not on the premises to discharge

any duty for Appellee or Appellee's agents, was a bare licensee, if not actually a trespasser. The duty of an owner or occupant of premises to a bare licensee or trespasser is neither to wilfully nor wantonly injure him and to use care to avoid injuring him when his presence is discovered in a place of danger. The complaint does not allege such facts as would constitute a violation by Appellee of that duty. Furthermore, Appellee takes the position that he is not bound by the acts of the husband where they do not appear to be within the scope of employment and do not appear to reasonably discharge any duties of the employment.

SUMMARY OF THE ARGUMENT

The Motion to Dismiss is in the usual form (Tr. pp. 15-16) that "the complaint fails to state a claim against defendant upon which relief can be granted." The Appellants made no objections below to the form of the Motion and it was fully argued on its merits. On this appeal, the Appellants have again fully argued the merits of the Motion in their Brief. They are, therefore, presumed to be clearly aware of the grounds of the motion and no objections may now be heard as to the form of the Motion.

Trammell v. Fidelity & Casualty Co. of N. Y., 45 Fed. Supp. 366;
Holtzoff and Cozier, Federal Procedural Forms, p. 147.

Under Nevada law, the facts do not render Mrs. King an Invitee, as she was not requested to do any act to aid her husband in the discharge of his duties for Appellee and her presence on the premises was of no mutual bene-

fit to herself and Appellee. Mr. King's request to his wife to accompany him was an act to be done outside Appellee's premises and Mrs. King's use of the toilet in no way tended to discharge her husband's request so as to facilitate Appellee's business.

Nevada Transfer and Warehouse Co. v. Peterson, 99 Pac. (2d) 633;
Restatement of Torts, Section 330;
Kruse v. Houston R. R. Co., 253 S. W. 623;
45 Corpus Juris 814;
Knight v. Farmers Gin Co., 252 S. W. 30;
Seavy v. I. X. L. Laundry, 108 Pac. (2d) 853;
Smith v. Pickwick Stages, 297 Pac. 940;
Gotch v. K & B Packing Co., 25 Pac. (2d) 719;
Keeran v. Spurgeon Merc. Co., 191 N. W. 99.

The presence of Mrs. King on Appellee's premises to use the toilet thereon for her own convenience, gave her the status of a bare licensee. Mrs. King was neither a customer nor an employee and had no reason to be on Appellee's premises, except for her own personal desires, absolutely unconnected with and unrelated to Appellee's business.

38 American Jurisprudence 765, para 104;
45 Corpus Juris 788, para. 194;
Babcock & Wilcox v. Nolton, 71 Pac. (2d) 1051;
McNamara v. MacLean, 19 N. E. (2d) 544;
Collins v. Sprague's Benson Pharmacy, 245 N. W. 602;
Cobb v. First National Bank of Atlanta, 198 S. E. 111;
Freeman v. Levy, 5 S. E. (2d) 61;
Herzog v. Hemphill, 93 Pac. 899;
Schmidt v. Bauer, 22 Pac. 256.

No violation of duty to a licensee is alleged in the complaint, in this: (1) The facts do not show a wanton or wilful act on the part of Appellee or his agents, and (2) the facts do not show a failure to exercise due care towards Mrs. King after her presence in a place of danger was discovered. There is no design, purpose or intent to do wrong and reflect injury on Mrs. King and there is no affirmative act alleged to show a failure to exercise care.

Crosman v. Southern Pacific Co., 194 Pac. 839;
Babcock & Wilcox v. Nolton, 71 Pac. (2d) 1051;
Garthe v. Ruppert, 190 N. E. 643;
Kneiser v. Belasco Blackwood Co., 133 Pac. 989;
Standard Oil Co. v. Henninger, 196 N. E. 706;
McNaughton v. Illinois Central R.R., 113 N. W. 844;
McMullen v. M. & M. Hotel Co., 290 N. W. 3;
Thalheimer Bros. v. Casci, 168 S. E. 433;
Herzog v. Hemphill, 93 Pac. 899;
Schmidt v. Bauer, 22 Pac. 256.

The complaint shows on its face that Mrs. King was guilty of contributory negligence in walking into a dark opening, which she presumed to be the toilet. There being no wanton or wilful conduct alleged in fact, contributory negligence as a defense is available in Nevada. The complaint shows that Mrs. King could see reasonably clearly (Tr. p. 7) but continued walking, thus causing her own fall.

Crosman v. Southern Pacific Co., 194 Pac. 839;
Schmidt v. Bauer, 22 Pac. 256.

The act of Mr. King in directing his wife was not binding on Appellee as it was not in the course of employment and did not reasonably tend to discharge the duties

of that employment. In permitting his wife to go to the toilet and in directing her, Mr. King was acting upon his own and there is nothing in that conduct which is connected with or related to Appellee's business.

Corbett v. Spanos, 173 Pac. 769;
Nevada Transfer and Warehouse Co. v. Peterson, 99 Pac. (2d) 633;
Restatement of Agency, Section 242;
Keeran v. Spurgeon Merc. Co., 191 N. W. 99.

I.

ARGUMENT OF THE CASE AND THE LAW

The Motion to Dismiss is in proper form and, further, no objections having been made in the District Court and the matter having been fully argued on the merits, no objection can now be made as to the form of the Motion.

The Motion to Dismiss states that "the complaint fails to state a claim against defendant upon which relief can be granted" (Tr. pp. 15-16). This is the usual form used in the practice in the District Court and recommended by authors in the field of practice and procedure.

Holtzoff and Cozier, Federal Procedural Forms, p. 147.

Further, the Appellants made no objections in the District Court below and the Motion was argued fully on its merits. Neither did Appellants specify the form of the motion as a point of error upon which they would rely on this appeal. (Tr. pp. 29-34). The Appellants have again argued the merits of the Motion in their Brief and seem

fully advised of the grounds of the Motion. They have therefore, waived objections and the Court may consider the motion to dismiss upon the points argued.

Trammell v. Fidelity & Casualty Co. of N. Y., 45 Fed. Supp. 366.

II.

Under Nevada law the facts do not render Mrs. King an invitee as she was not requested to do any act to aid her husband in the discharge of his duties for Appellee and her presence on the premises was of no mutual benefit to herself and Appellee.

It is alleged in the complaint (Tr. p. 4) that:

> "The said George C. King, being an elderly man and in very poor health, and subject to falling asleep without warning, requested his wife, Jessie F. King, one of the Plaintiffs herein, to accompany him on a trip by automobile to Bridgeport, California, in order that she might be with him and be able to aid and assist him in the event that he should need such aid and assistance on said trip.
>
> "That the said Plaintiff, Jessie F. King, consented to and agreed to, accompany said George C. King for the reasons and purposes just mentioned, and in pursuance of said arrangement and plan went with the said George C. King in his automobile on the morning of Sunday, July 19, 1942, to the business place of the Defendant, at 817 East 4th Street, Reno, Nevada, in order that, in pursuance of the carrying out by said George C. King of the requirements of his employment by the Defendant, the said George C. King could there get certain materials and samples which he in turn intended to exhibit to the prospective customer of the Defendant hereinabove mentioned."

We believe this allegation is an attempt to bring the instant action with the rule announced by the Nevada case of *Nevada Transfer and Warehouse Company v. Peterson,* 99 Pac. (2nd) 633.

In that case, a wife who had come into defendant's warehouse to bring her husband a flashlight, and who was injured while leaving the premises, was held to be an invitee where a servant of the defendant in that case, acting within the scope of his employment, requested the wife to go to the warehouse office and remain there while a stranger was using the telephone therein. The Court said:

> "One in charge of premises has authority to do thereon any reasonable act to accomplish the discharge of his duties. There was nothing unreasonable in requesting Mrs. Peterson to stay in the office."

That case is easily distinguished from the present one, as there was nothing requested by Mr. King of his wife to be done on the premises which in any way was within the scope of his employment or was of benefit to the Appellee. The complaint does not alleged as a matter of fact that Mrs. King was to do anything on the premises, but only that she was to accompany her husband "in the event that he should need such aid and assistance." (Tr. p. 4). It would be farfetched to say that she was in any sense an invitee on the premises where the request for her to accompany her husband was to be fully performed outside and exclusive of the premises of Appellee.

Neither does it avail plaintiff to term herself as an invitee and use the word "invitation." In *Restatement of Torts,* Section 330, a licensee is defined as follows:

> "A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by *invitation* or *permission.*"
>
> (Italics supplied.)

The words "invite" and "permit" are used interchangeably and the true test is whether the presence of the person involved is of mutual interest to himself and to the occupant of the premises. As said in *Kruse v. Houston R. R. Company,* 253 S. W. 623:

> "'The general test is whether the injured person, at the time of the injury had present business relations with the owner of the premises which would render his presence of mutual aid to both, or whether his presence on the premises was for his own convenience, or on business with others than the owner of the premises. In the absence of some relation which inures to the mutual benefit of the two, or to that of the owners, no invitation can be implied, and the injured person must be regarded as a mere licensee."

It is said in 45 *C. J.* 814 that

> "Even an express invitation to visit the premises has been held not to give one the legal status of an invitee where the visit was entirely in his own interests and the inviter had no interest therein."

In the case of *Knight v. Farmers Gin Co.,* 252 S. W. 30, it was held that plaintiff who was a stockholder in the defendant company and was invited to look over the plant, was a mere licensee even though he had been given an express invitation, where his visit was entirely for his own satisfaction in looking after his own investments.

In *Seavy v. The IXL Laundry,* 108 Pac. (2nd) 853, a Nevada case, there was a recovery for damages suffered

by plaintiff in using a toilet in the laundry. The qualifications of the recovery are important to us in determining the liability in this case. The Court on page 857 states:

> "From a consideration of the cited cases we deduct the rule to be that if a *customer* comes upon the premises of a proprietor at either his express or implied invitation, *he has a right to use the toilets on the premises if he receives an invitation,* either express or implied, from the proprietor, employee or the agent of the proprietor, *providing the entry was made by the customer for the purpose of transacting business with the proprietor*; that the entry was made at a reasonable hour, when business transactions are ordinarily conducted; and that the entry was made in an orderly manner and on business that the proprietor was interested in." (Italics supplied.)

It thus appears that there must be (a) an entry made for the purpose of transacting business with the proprietor; (b) the entry must be made at a reasonable hour when business transactions are ordinarily conducted; and (c) the entry must be made in an orderly manner and on business that the proprietor is interested in.

Applying the rules of the *Seavy Case* to the one at bar, by no stretch of the pleadings can plaintiff bring herself within the rule there set out whereby recovery may be allowed for negligence to an invitee.

In the case of *Gotch v. K & B Packing Co.,* 25 Pac. (2d) 719, cited in Appellants' Brief, it was held that the deceased was a licensee on the defendant's premises and could not recover when she fell into an elevator shaft, while taking lunch to her son, an employee of the defendant. It thus appears that, although technically fur-

nishing defendant's employee's lunch is of some benefit to defendant, still the deceased in that case was held to be a licensee, and the open elevator shaft was a condition of the premises for which the occupant was not liable for injuries if a licensee fell therein. The latter case is a leading annotated case in 89 *A. L. R.* at page 753, followed by numerous decisions to the effect that an occupant is not liable to a person whose presence on the premises is in no way a benefit to the occupant.

In the case of *Keeran v. Spurgeon Merc. Co.,* 191 N. W. 99, the plaintiff returned to defendant's store to recover a coat which he had left on a former visit. The plaintiff was directed by a clerk to a place behind the counter where he might find the coat and, upon walking behind the counter, plaintiff fell through an opening in the floor and was injured. The Court held that as plaintiff was on a personal errand of his own, which was of no benefit to defendant, that plaintiff was a mere licensee, against whom defendant had violated no duty.

In the case of *Smith v. Pickwick Stages,* 297 Pac. 940, cited by Appellants, plaintiff's status was held to be that of an invitee when she was hit by a piece of luggage thrown from the top of a stagecoach by one of defendant's employees in the loading room of defendant's depot. Plaintiff, in that case, had been invited to go into the loading room by one of the defendant's employees to help her mother, who had just arrived on a bus, look for a purse that had been lost.

On page 943 of 297 Pac. the Court said:

> "We think that plaintiff's status was that of an invitee for another reason, to wit: It was the duty of appellant to give its passengers a reasonable opportunity to remove their baggage, and when plaintiff aided in looking for the lost purse, a duty which rested on the stage driver, she was also aiding the appellant; *or, in other words, plaintiff, at the time she was injured, was engaged in a matter which was to the mutual advantage of appellant and its passenger,* and was therefore an invitee on the premises."
>
> (Italics supplied.)

It is thus apparent from the Nevada cases and those of other jurisdictions that Mrs. King could not have been an invitee and that her presence on the premises, being for her own convenience, gave her a status of less dignity than an invitee.

III.

The presence of Mrs. King on Appellee's Premises to use the toilet thereon for her own convenience gave her the status of a bare licensee.

The general definition of a licensee is given in 38 *Am. Jur.* 765, paragraph 104, as follows:

> "A licensee is broadly defined as a person who enters upon the property of another for his own convenience, pleasure or benefit."

It is said in 45 *C. J.* 788 at paragraph 194:

> "194. B. Licensee—1. Who are Licensees. a. In General. A person is a licensee where his entry or use of the premises is permitted by the owner or person in control thereof, or by operation of law, so that he is not a trespasser, but is without any express or im-

plied invitation. He therefore occupies a position somewhere between that of a trespasser and that of an invitee.

"A license is distinguished from an invitation in that the licensee is on the premises by sufferance only, and not by virtue of any business or contractual relation with, or any enticement, allurement, or inducement to enter held out to him by, the owner or occupant, but merely in his own interest and for his own purposes, benefit, convenience, or pleasure. The terms 'licensee' and 'invitee' are, however, sometimes confused, for although, in a strict and legal sense, there is a well defined distinction between a licensee and an invitee, the line of demarcation is oftentimes shadowy and indistinct, and in a general sense one who is invited on premises is a licensee. Accordingly the courts have sometimes drawn a distinction between what is termed a 'mere,' 'bare,' or 'passive' license and what is termed a 'license by invitation,' or between a so-called 'licensee' who enters by invitation or inducement of the owner, or on business with him, or in the discharge of a public or private duty and one who enters voluntarily without any reason. In England a similar distinction has been drawn between a 'bare licensee' and what is termed a 'licensee with an interest.''

Applyling these legal principles to the complaint, it is clear that Mrs. King can, at most, bring herself within the status of a licensee. Many cases involving the permissive use of a toilet for the sole convenience of the person using the toilet have held that such person was a licensee.

In *McNamara v. MacLean,* 19 N. E. (2nd) 544, plaintiff was a customer in defendant's store and requested to use the toilet. The defendant gave permission but told plaintiff that the toilet was in the cellar and for use of employees.

Defendant lifted a hatch and showed plaintiff the way down a narrow stairway and plaintiff in proceeding, lost her balance and fell on the third step. Said the Court:

> "Although plaintiff was an invitee in the store, on the evidence she was a bare licensee on the stairway (citing cases). The presence of defendant, and her express permission to use the toilet, gave the plaintiff no higher standing. The case of Jacobsen v. Simons, 217 Mass. 194, 104 N. E. 490, where a toilet was maintained for customers and they were invited to use it, is distinguishable. In the absence of wanton or reckless conduct, of which there is no allegation and no evidence, the plaintiff cannot recover."

In the case of *Collins v. Sprague's Benson Pharmacy,* 245 N. W. 602, where a customer of a drug store requested the use of a toilet and was injured by falling down a stairway near the toilet door and the toilet was one used by employees, the syllabus of the Court states:

> Where one, *at his own request,* and solely for his personal pleasure, convenience, or benefit, enters upon the private portion of the business premises of another, with his consent, but without an invitation, he is a bare licensee in such portion of the premises not open to the public, and the occupier of the premises owes no duty to him, save to refrain from inflicting injury upon him." (Italics supplied.)

In *Cobb v. First Nat. Bank of Atlanta,* 198 S. E. 111, the plaintiff went to the bank to secure a blank promissory note. Plaintiff was directed to a guard who was instructed to take plaintiff to another part of the bank where she might get the note. As the guard passed through a gate, he invited plaintiff to follow, telling her to watch out for her head on the bar above, but failed to warn plaintff of

a bar below, over which plaintiff tripped and was injured. The Court held plaintiff to be a licensee, sustained a demurrer to the complaint and dismissed the petition.

In *Freeman v. Levy,* 5 S. E. (2nd) 61, where platniff entered a store and went to the alteration department to visit a relative of her husband and was injured on the stairs to the alteration department, the Court held plaintiff to be a licensee, defining it thus:

> "A licensee is a person who is neither a customer, nor a servant, nor a trespasser, and does not stand in any contractual relation with the owner of the premises, and who is permitted expressly or impliedly to go thereon merely for his own interest, convenience, or gratification."

In *Herzog v. Hemphill,* 93 Pac. 899, plaintiff's intestate was killed when he fell while visiting the urinal in the rear of a tamale store operated by defendant. The deceased went to defendant's store to make a purchase of tamales and, while there in company of one Miller, the latter expressed a desire to use the urinal. The deceased volunteered to show the way and while on the way fell off an opening at the end of a cul de sac on the stairway. The toilet was used often by patrons of the premises in that case. Said the Court:

> "The complaint was demurred to upon the ground that it states no cause of action, and we think the ruling of the trial court in sustaining the demurrer was correct. The complaint does not show that the deceased was more than a mere licensee as to the portion of the premises where the accident occurred. It is a well-settled rule of law that the owner or occupier of land or buildings who, by invitation, express or implied, induces persons to come upon his

premises, is under a duty to exercise ordinary care to render the premises reasonably safe; but he assumes no duty to one who is on his premises by permission only, and as a mere licensee, except that while on the premises no wanton or wilful injury shall be inflicted upon him." * * *

"Mere permission, or a habit, however, of an owner of allowing people to enter and use a certain portion of his premises, is indicative of a license merely, and not of an invitation."

See also *Schmidt v. Bauer,* 22 Pac. 256.

There are few definitions of a licensee as clear as that which is set out in the Nevada case of *Babcock & Wilcox v. Nolton,* 58 Nev. 133, 71 Pac. (2nd) 1051. In that case plaintiff was injured while sitting in her parked automobile on defendant's premises, when that automobile was struck by a truck operated by one of defendant's employees. The Court held that the jury were clearly instructed in the definitions given as follows on page 1053 of 71 Pac. (2d):

"A license is distinguished from an invitation, in that a licensee is on the premises by sufferance only and not by virtue of any business or contractual relation with, or any enticement, allurement, or inducement to enter held out to him by the owner or occupant, but merely his own interest and for his own purposes, benefit, convenience or pleasure."

"In order that a person may have the status of a licensee the owner or person in charge of the premises must have knowledge of his entry or his presence thereon, or of a customary use of the particular portion of the property used for the purpose for which such person is using it."

Sifting out all of the conclusions of Appellants in their

pleading, it appears that the only reason that Mrs. King was on Appellee's premises was to use the toilet for her own convenience. The mere fact that her husband, Appellant George C. King, requested his wife, Jessie F. King, to accompany him, did not require her entrance and use of the premises, nor did her use of the premises facilitate or benefit Appellee's business. Clearly, Jessie F. King is a licensee as defined by our Nevada law applicable to this case.

IV.

No violation of duty to a licensee is alleged in the complaint, in this: (1) The facts do not show a wanton or wilful act on the part of Appellant or his agents, and (2) the facts do not show a failure to exercise due care towards Mrs. King after her presence in a place of danger was discovered.

In Nevada the duty of an owner or occupant of premises to a licensee has been established in several cases. The rule in Nevada as to the duty owed to a licensee is found in Crosman v. Southern Pacific Co., 194 Pac. 839:

> "On this trial, under the evidence, he appears as a bare licensee. But, as the duty the respondent owed him as a licensee under the facts of this case, was no greater than a trespasser—that is, not to wantonly or wilfully injure him or fail to exercise due care to prevent his injuries after his presence in a place of danger was discovered—the difference in the evidence in this respect cannot make the decision of the Court on the former appeal less controlling as to the question of proximate cause."

Again, in the case of *Babcock & Wilcox v. Nolton*, 71 Pac. (2nd) 1051, the Court said:

> "You are instructed that with respect to a licensee, the owner or person in charge of property owes him no duty except to refrain from wilfully or wantonly injuring him after his presence is, or under the circumstances, should have been discovered."

The facts in the case at bar do not show any wanton or wilful conduct on the part of Appellee or his agents. The condition of the premises is not wanton and wilful conduct. The direction of Mr. King to his wife, although not binding on Appellee, was in itself not wanton and wilful. The husband, who appears as one of the plaintiffs in this case, certainly did not intend or design to injure his wife. Further, no act or conduct of an affirmative nature is alleged, and mere directions, unless given with an intent to injure, are not such affirmative acts as to constitute a violation of duty to a licensee.

In the case of *Garthe v. Ruppert,* 190 N. E. 643, the Court states the duty to a licensee such as the one in the instant case to be as follows:

> "Where a person goes upon the premises of another without invitation, but simply as a bare licensee, and the owner of the property passively acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises, the owner is not liable for negligence, for such person has taken all the risks upon himself."

In the case of *Kneiser v. Belasco Blackwood Co.,* 133 Pac. 989, where a man was injured when he fell down the stairs on his way to the urinal, the duty of the occupier of the premises in such case was stated:

> "If he was a mere licensee, intending by permission only to make use of the toilet located on the premises,

then respondent, under no circumstances which are shown by the evidence, would be required to exercise any care toward him; its obligation only being to refrain from causing him injury through a wilful act."

"* * * The rule is stated in Shearman and Redfield on Negligence, vol. 2, par. 705, as follows: 'A mere passive acquiescence, on the part of the owner or occupant, in the use of real property by others, does not involve him in any liability to them for its unfitness for such use. They take all risks upon themselves. * * *'" See, also, Barrows on Negligence, p. 304. A case bearing many points of similarity in its condition of facts is that of Herzog v. Hemphill, 7 Cal. App. 116, 93 Pac. 899, as is also the case of Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580."

It cannot be said as a matter of law that Appellee was guilty of negligence toward ~~plaintiff~~ Plaintiff Mrs. King. The question of negligence as to a licensee in leaving a cellar door unlocked or partly open, was discussed in the case of *Standard Oil Co. v. Henninger,* 196 N. E. 706, where a person who stopped at a gas station to inquire the way and, after obtaining such information, requested the use of the toilet. The station was so constructed as to have two doors in the rear, both unlocked, one leading to a stairway to the basement of the building, and one being the toilet. (A map of the premises may be found at page 708 of 196 N. E.) The attendant signified assent to plaintiff's request and the plaintiff turned the knob of the cellar door and fell down the stairs. The Court said, on page 709:

"If the appellee was a mere licensee, he took the premises as he found them, and if he was an invitee,

> the duty then rested upon the appellant to exercise ordinary care toward the appellee. Under the circumstances, it is not necessary for us to determine whether or not appellee was an invitee or licensee. The closed door to the basement was not a trap or pitfall, and due precaution had been taken by the closing of the door against its improper use. Negligence upon which this action is predicated is that of failing to lock the door. The appellant was not bound to anticipate that people coming upon the premises would assume that every door leading from the main part of the station led to the washroom nor that persons with the ordinary use of their senses would precipitately open doors therefrom and enter without thought as to where they led."

To the same effect is *McNaughton v. Illinois Central R. R.*, 113 N. W. 844 (where there is also a diagram of the premises). In that case plaintiff entered the women's waiting room of a depot and, instead of proceeding ahead to the toilet room where she intended going, plaintiff opened a door to her left, supposing it to be the toilet room, stepped in and fell to the bottom of the basement stairway. Leaving the door unlocked was alleged to be negligent. Plaintiff here was to be a passenger on the railroad and was an invitee to whom even a greater duty was owed than to the present plaintiff. The Court said:

> "But it can hardly be said that a closed door to the stairway down to a basement with door knob and catch constitutes a trap or pitfall. Every precaution had been taken, save that of locking it, against its improper use. The heating apparatus was located in the basement, access to which was by this stairway, and leaving the door used by the employees fastened so as to open only upon turning the knob, though unlocked, especially in daylight, when any one upon opening it could plainly see the stairway, was not a

> negligent act. The company was not bound to anticipate that passengers will assume that every door from the room opens into a toilet, or that without the ordinary use of their senses they will precipitately open the doors therefrom and enter without thought as to where they lead. From such rooms there are several doors, and no one has the right to act unreservedly upon the belief that any door would be locked unless intended for some particular purpose. The fact that a door is there is a warning that it is the means of exit or of entrance from or to some other apartment, and a way up or down stairs, or to a baggage room, or to a closet; and no one has the right to assume, without knowledge, or its equivalent, the character of the place to which it affords access. The door was maintained in a way convenient for the employees in caring for the furnace, and not dangerous to the public."

In the case of *McMullen v. M. & M. Hotel Company,* 290 N. W. 3, where a person who entered a drug store to use the telephone and was directed "right over there" by the manager who pointed to the telephone, it was held that that person was a licensee when she sued for injuries suffered by reason of a fall through a trap door near the telephone. Plaintiff in that case contended that, even considering she was a mere licensee, nevertheless, that the manager of the store had directed her to a place without warning her of the existence of the trap door and the danger of falling into it. Plaintiff there alleged that the manager, as a reasonably careful and prudent man, should have known under all the circumstances that the door was open and should have warned plaintiff. The Court said:

> "Such contention is without merit. To adopt it would be to disregard the rule as to a mere licensee, and permit recovery on the basis of ordinary negli-

> gence. Under our decisions above reviewed, such is not the law. Recovery by a licensee must be based upon wanton or wilful misconduct on the part of the party to be charged. The evidence failed to sustain plaintiff's contention that the defendant hotel company was guilty of any such conduct."

The case of *Thalheimer Bros. v. Casci,* 168 S. E. 433, is helpful. There a customer requested the use of a toilet in a store and was directed to the employees' toilet in the basement. While searching for the toilet, plaintiff entered a basement door and fell down the steps. As to her status, the Court said:

> "The case, like most cases, decides itself when the facts have been sifted out. Plaintiff knew that she was being directed to a place where customers were not sent except in emergencies. But whether she knew this or not, she did *not go where she was told to go,* but into a pplace which was not a public part of the storeroom. Manifestly, she was not an invitee if she went where she was not invited, and she was not a licensee if she went where she had no license to go. The utmost that we can say is that she was but a bare licensee—perhaps it would be more accurate to say that she was an unwitting trespasser. To the storeroom generally she was an invitee, but she was by no implication invited to go into that part of it not intended for use by customers, nor did she, as a matter of fact, go there in such capacity." (Italics supplied.)

In the case of *Herzog v. Hemphill,* 93 Pac. 899, where plaintiff's intestate, a customer in defendant's store, was killed when he fell through an opening at the end of a cul de sac on the stairway going to the urinal, it was held that the deceased was a licensee as to that portion of the premises and that, as the urinal was not one generally

used by the public, the defendant could not be liable for injuries received by persons going to and from such place. The Court said:

> "There is no allegation that the urinal was designed or maintained for the use of patrons of the store; nor any allegation that it was designed for use or used as a part of the business conducted on the premises."

In the case of *Schmidt v. Bauer,* 22 Pac. 256, it was held that there was no actionable negligence where a plaintiff on his return from the urinal went through a door where the floor had been taken up and was injured. The plaintiff was held to be an invitee in defendant's saloon, but a licensee as to that of the premises where the urinal was located and at which plaintiff had no business with defendant.

It is apparent from the authorities that a person using a toilet in the status of a licensee has no greater rights than a mere trespasser and in the absence of wanton or wilful conduct or failure to use due care when such person is in a place of danger, no liability attaches to the occupant of the premises for injuries to such bare licensee. A condition of the premises or a direction is not wanton or wilful conduct. Mrs. King was not in a place of danger, but used a doorway and walked into a stairway of her own accord and volition.

V.

The complaint shows on its face that Mrs. King was guilty of contributory negligence in walking into a dark opening which she presumed to be the toilet.

Where there is no wilful or wanton conduct shown the defense of contributory negligence is available to the defendant in Nevada.

Crosman v. Southern Pacific Co., 194 Pac. 839.

As we have heretofore shown, the allegations of the complaint do not constitute wilful or wanton conduct on the part of Appellee or his agents. Therefore, the negligence of Mrs. King herself may be used as a defense and, where it appears on the face of the complaint, it negatives the cause of action. Mrs. King entered the rear of Appellee's premises and although she could see "reasonably clearly (Tr. p. 7) she continued to walk into semi-darkness. Furthermore, she did not ascertain the whereabouts of the light, but opened the cellar door and walked therein.

In *Crosman v. Southern Pacific Co.,* supra, where plaintiff, on a velocipede, was struck by defendant's engine, the Court held plaintiff to be contributorily negligent in proceeding through the dark, although defendant's engine had no lights and gave no warning.

See also *Schmidt v. Bauer,* 22 Pac. 256.

VI.

The act of Mr. King in directing his wife was not binding on Appellee as it was not in the course of employment and did not reasonably tend to discharge the duties of that employment.

Conceding, but not admitting, that Mr. King had the right to invite his wife to accompany him on the trip, still there are no allegations to show any authority to invite Mrs. King on the premises, especially for the purpose of using the toilet. In the case of *Nevada Transfer and Warehouse Co. v. Peterson,* 99 Pac. (2d) 633, upon which Appellants place so much reliance, the plaintiff in that case, while on the premises of the defendant, was requested by another employee to do an act which actually was in discharge of the employe's duties and tended to facilitate and benefit the defendant. No benefit to Yancey can be shown by Mrs. King's use of the toilet.

In the *Restatement of Agency,* Section 242, the liability to an invitee of a servant is stated to be:

> "A master is not subject to liability for the conduct of a servant towards a person harmed as the result of accepting or soliciting from the servant an invitation, not binding upon the master, to enter or remain upon the master's premises or vehicle, although the conduct which immediately causes the harm is within the scope of the servant's employment."

In the case of *Corbett v. Spanos,* 173 Pac. 769, the plaintiff had lunch at defendant's candy and lunch counter and thereafter requested use of the toilet. An employee directed her beyond the partition dividing the store to a toilet in the rear thereof used by employees. On returning

from the toilet to the front of the store, plaintiff fell into an opening caused by a trap door being lifted during the time she was in the toilet but which was closed when she first went through the passageway. The Court held that (1) plaintiff was a mere licensee, (2) that no duty had been violated as to plaintiff by opening the trap door while she had yet to return, and (3) that the direction of the servant in allowing plaintiff to use the toilet, was not binding on the defendant so as to make plaintiff an invitee. On page 770, the Court said:

> "While in the complaint in the case at bar it was alleged that the so-called dressing-room was placed by the defendant Spanos at the disposal of his customers and as an inducement to have customers patronize his business, absolutely no evidence in support of this allegation was produced at the trial except the fact that, on the single occasion when plaintiff was injured, she was shown to it by an attendant in response to her query as to whether or not there was a dressing room in the place. It affirmatively appeared in the evidence that there was no sign on the door to the passageway leading to the toilet in question to indicate that there was a dressing room there for the use of customers, and the simple equipment of the room itself, as well as its situation in a poorly lighted passageway, negatives the idea that it was intended for the use of any one other than Spanos' employees. The attendant who showed plaintiff the way was not called to testify upon the trial, and no authority in her to permit the use of the room by the patrons of the place was shown. In the absence of such showing, no inference of a general invitation or inducement by the proprietor of the store such as is alleged in the complaint can be legitimately drawn from this single instance of its use by permission of his servant. The only duty of a proprietor of a store to a mere licensee, when in that portion of the premises not

> customarily used by the public, and to which the licensee is not expressly or impliedly invited, is to avoid doing any wilful or wanton injury to such licensee, and no such injury is shown by the record in the case at bar."

In the case of *Keeran v. Spurgeon Merc. Co.,* 191 N. W. 99, the plaintiff returned to defendant's store to secure an article which he had left there for safe keeping, and was directed by a clerk behind the counter, and thereupon was injured when he fell down unlighted stairs concealed behind the counter. As to the permission of the clerk to plaintiff, it was said:

> "It is insisted, however, that the conversation of the appellant with the clerk in the store was an express invitation to the appellant to go to the place in question to get his coat, and that this conversation rendered him an invitee. Giving to the conversation the broadest construction that could fairly be placed upon it, it was no more than a permission, or license, to the appellant to go to the place in question and get the coat for himself. It was not an invitation to the appellant to do anything whatever in connection with the business of the appellee. Furthermore, in this connection there is no evidence that the lady clerk who told the appellant where she had placed the coat had any authority, express or implied, to invite the appellant to go behind the counter to the place in question."

There is nothing in the complaint which shows that the directions given by Mr. King to his wife in any way relate to Appellee's business or connects Mrs. King with that business and, furthermore, there is nothing which Mrs. King was requested to do on the premises which discharges any duty of Mr. King to Appellee nor which facilitates, benefits or is of advantage to Appellee.

CONCLUSION

In view of the foregoing, it is believed that the District Court was right in holding that Mrs. King was a licensee and that Appellee had violated no duty to a person in such status, and in further holding that the employment of Mr. King and his conduct in directing Mrs. King was not of such character as would make Appellee liable in law for Mrs. King's injuries. It is respectfully submitted that the judgment of the District Court should be affirmed.

Dated: Reno, Nevada, August 11, 1944.

Respectfully submitted,

E. F. Lunsford and
Bert Goldwater,

Attorneys for Appellee.